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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 224

THE UNITED STATES,

Petitioner,

v.

PROVIDENT TRUST COMPANY, as Administrator of the Estate of GEORGE THEODORE ROBERTS, Deceased,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Claims (R. 5-8) is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. (R. 8.) The petition for writ of cer-

tiorari was filed July 1, 1933, and the writ was granted October 9, 1933. (R. 10.) The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The sole question is whether medical testimony that the reproductive organs of a testator's daughter had been removed prior to his death, and that therefore she was incapable of bearing a child, is admissible to establish the right to deduct from the value of the testator's gross estate, under Section 403 (a) (3) of the Revenue Act of 1918, the value of bequests to charitable institutions limited upon the death of the testator's daughter without issue.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in Appendix A, *infra*, pp. 17-18.

STATEMENT OF THE CASE

The petitioner's statement of facts is accurate. It omits, however, certain findings of the Court of Claims which, because they are of material importance, should be added. They are summarized as follows:

The testator's daughter, Elizabeth Wentworth Roberts, consulted the gynecologist upon the direction of her attending physician. The operation and removal of the uterus with the tumor, the Fallopian tubes, and both ovaries were necessary to prevent further impairment of her health. (R. 5.)

SUMMARY OF ARGUMENT

The truth should be kept from the Court only if a public policy of greater consequence demands. The rule relied upon by the appellant to exclude the truth has been rendered obsolete and inapplicable to this case by modern medical knowledge and scientific certainty. The reasons assigned by the courts for the rule have no application to the circumstances in this case. Public policy requires the evidence for the proper and adequate administration of the taxing laws. There is, in this case, no public policy requiring the withholding from the Court of the facts.

ARGUMENT

The decision in this case turns entirely upon the admissibility of evidence. The Court below has proceeded upon the rule that " 'All facts having rational probative value are admissible, unless some specific rule forbids.' "[1]

Examining this rule the Court has determined that if the evidence is to be excluded, it must be " 'because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.' "[2]

Believing that truth should prevail as against inapplicable and archaic rules of exclusion, the Court

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1. This quotation in the opinion below (R. 6) was taken from *Wigmore's Evidence*, Vol. I, Sec. 10.
2. This quotation in the opinion below (R. 6) was taken from *Wigmore's Evidence*, Vol. I, Sec. 11.

in view of the undeniable facts in this case, has admitted the evidence in dispute. We believe that there was no error in that decision.

I

Modern Medical Knowledge and Scientific Certainty Have Made the Rule Contended for by the United States Obsolete and Inapplicable in this Case.

Research develops that no legal writer before Littleton refers to the rule urged by the petitioner. Littleton said:

> "* * * for the donee in general taile may never be said tenant in the taile after possibilitie of issue extinct, for that alway during his life, hee may by possibilitie have issue that may inherite by force of the same taile."[3]

Coke commented on Littleton as follows:

> "But if a man giveth land to a man and his wife, and to the heires of their two bodies, and they live till each of them bee C. yeere old, and have no issue, yet doe they continue tenant in taile, for that the Law seeth no impossibilitie of having children."[4]

And Blackstone, citing Littleton and Coke, said:

> "A possibility of issue is always supposed to exist in law, unless extinguished by the death

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3. *Littleton's Tenures* (1592 edition), fol. 8. This work was first published in 1481 or 1482.
4. *Coke on Littleton*, 28.

of the parties; even though the donees be each of them an hundred years old."[5]

These comments are made in connection with estates tail for the purpose of showing that a fee tail general cannot become a fee tail with possibility of issue extinct and that a fee tail special arises only upon the death of one of the spouses. They appear to be the product of logicians in tenure and have an extremely remote, if any, connection with a Federal estate tax dispute arising under modern American statutes.[6]

The rule arose in the latter part of the fifteenth century when medical knowledge was meagre, and more than three hundred years before abdominal surgery was practical. In the then state of medicine and surgery it was impossible to determine as a fact that either the male or female was incapable of procreation,—hence the rule. It was not until 1809 that an ovariotomy was performed.[7] General anaesthetics had not then been invented, and it was not until the use of ether as an anaesthetic by Morton in

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5. 2 *Blackstone's Commentaries*, 125.

6. The plaintiff in the case at bar has already appeared in a representative capacity before this Court in reliance upon a common law fiction still adhered to in the State of Pennsylvania only to find that this Court insisted upon deciding the issue upon "the actual results brought about by the death, rather than by a consideration of the artificial rules" which delimit the title, rights and powers of tenants by the entirety at common law. *United States* v. *Provident Trust Company and Sinkler, Administrators*, 281 U. S. 497, 74 L. ed. 991. If the "amiable" but venerable fiction in that procedure, a recognized rule of property law, did not bar a consideration by this Court of the actual facts it would appear that an archaic fiction of the adjective law should be no greater deterrent in the present procedure.

7. *Keen's Surgery*, Vol. 1, Chap. 1, p. 58.

1846[8] that abdominal surgery became practical. From that time operations such as that with which we are concerned could be successfully performed, and then for the first time in history was it possible for anyone to state as a fact that a woman was incapable of bearing children.

The modernity of medical knowledge is emphasized by the fact that of all the cases cited involving incapacity of a woman to bear children it appears that only three involved surgical operations.[9] The absence of such cases emphasizes the fact that the chief practical difficulty in the cases which have heretofore come before the courts has been the inconclusiveness of the evidence offered. In the case at bar we appear apparently for the third time in history with conclusive evidence that the woman involved was incapable of giving birth to a child at the time when such query arose. Only in a contemporary case[10] has a similar situation arisen. In respect to both the surgical features and the certainty of the fact, these two cases are novel.

That the rule has rested on ignorance and uncertainty and not on knowledge, will best be demonstrated by reading the cases cited in the petitioner's brief (pp. 7 to 14) and the appendix thereto. In every case the character of the evidence tending to

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8. *Keen's Surgery*, Vol. 1, Chap. 1, p. 61.

9. *Byers* v. *Beddow*, 106 Florida 166 (1932); *Guaranty Trust Co.* v. *Commissioner*, 27 B. T. A. 550 (1933), (decided 6 days before the case at bar and now on appeal in the United States Circuit Court of Appeals for the Second Circuit), and the instant case.

10. *Guaranty Trust Company* v. *Commissioner*, 27 B. T. A. 550, decided January 31, 1933. In *Byers* v. *Beddow*, 106 Fla. 166 (1932), the character of the operation does not appear from the opinion of the court.

show incapacity appears to have been considered and the judgments of the courts will be seen in large measure to have been formed from the facts appearing in the evidence offered. Uncertain as to the impossibility of issue from the evidence presented, the courts have fallen back on the ancient formula as a safer guide. See *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619; *Bowlin* v. *Rhode Island Hospital Trust Company*, 31 R. I. 289.

Nevertheless courts in the United States have frequently recognized incapacity to bear children where the evidence was less conclusive than here.[11] And the British courts have, except where the property interests of living persons would be adversely affected, regularly admitted such evidence.[12] Moreover, in the field of law pertaining to damages for personal injury, it appears to be the universal rule that evidence will be received to show that the injury destroyed the power to bear issue. This Court has in fact so held.[13] It would thus seem that the courts in the United States are not so overwhelmingly averse

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11. *Whitney* v. *Groo*, 40 App. D. C. 496; *Johnson* v. *Beauchamp*, 5 Dana (Ky.) 70; *Male* v. *Williams*, 48 N. J. Eq. 33; *Gowen's Appeal*, 106 Pa. 288; *Bacot* v. *Fessenden*, 130 App. Div. (N. Y.) 819; *Ansonia National Bank* v. *Kunkel*, 105 Conn. 744. See also *Apgar* v. *Apgar*, 38 N. J. Eq. 549; *In re Staheli*, 78 N. J. Eq. 74, 77.

12. Among the many British cases recognizing impossibility of issue are the following: *Mackenzie* v. *King*, 17 L. J. Ch. N. S. 488 (1848); *In re White*, 1 Ch. 570 (1901); *Leng* v. *Hodges*, Jac. 585 (1822); *Edwards* v. *Tuck*, 3 De G. M. & G. 39 (1853); *Brown* v. *Pringle*, 4 Hare 124 (1845); *Haynes* v. *Haynes*, 35 L. J. (Ch) 303 (1866).

13. *Denver & R. G. Ry.* v. *Harris*, 122 U. S. 597, 7 Sup. Ct. 1286 30 L. ed. 1146. See also *Normile* v. *Wheeling T. Co.*, 57 W. Va. 132; *Sedgwick on Damages* (ninth edition), Vol. 1, Sec. 41a; *Partridge* v. *Boston & M. R. Co.*, 184 Fed. 211 (C. C. A. 1st); *Alabama G. S. R. R. Co.* v. *Hill*, 93 Ala. 514.

to the recognition of modern medical knowledge on this subject as petitioner's brief would imply.[14]

It appears important to point out again that in all but two of the large number of cases pertaining to property interests the evidence is *opinion* evidence. It may be amazing but it appears to be true that the case at bar and the cases of the *Guaranty Trust Company* v. *Commissioner*, 27 B. T. A. 550 (decided six days before the decision of the Court of Claims in the instant case), and *Byers* v. *Beddow*, 106 Fla. 166 (1932), are unique. In them alone are we able to discover that positive testimony has been offered that child birth was scientifically impossible.

As a consequence the petitioner relies upon a presumption, the product of the artificial reasoning necessary to round out an intricate medieval concept. With the appearance of modern abdominal surgery the ancient presumption has become a demonstrable fiction—a bar to the truth—to be continued only if overwhelmingly desirable in the public interest. No such desirability exists here.

II

None of the Reasons Underlying the Frequent Refusal of the Courts to Hold That a Woman Is Incapable of Bearing Children Are Applicable Here.

None of the reasons advanced in those decisions which have held that a woman is presumed, notwithstanding the evidence adduced, to be able to bear children at any time are pertinent to the case at bar.

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14. Petitioner's brief, p. 7.

The rule was present before the reasons since assigned. The reasons are excuses.

(a) *The Difficulty of Fixing an Age, or Precise Natural Physiological Change, Subsequent to Which a Woman's Capacity to Bear Children Shall Be Considered at an End, Is Not Involved Here.*

It has been said that the impossibility of fixing any particular age at which a woman's child-bearing capacity ceases makes the determination of incapacity from age conjectural and unreliable. *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619, 621, 622. Even the Court which so declared, however, has indicated that other evidence of definite character may establish the incapacity to bear issue. In *Hill* v. *Spencer*, 196 Ill. 65, 70, the Supreme Court of Illinois said:

> "The allegation that Martha Hill is past the time of life to have children is meaningless, as she is, in law, presumed to be capable of bearing children as long as she lives, *unless more than a mere matter of age is stated in the bill.*" (Italics ours.)

The facts in the instant case, moreover, stand in unmistakable contrast to those in which the courts have excluded evidence of age and mere natural physiological conditions. In those cases the evidence varies in certainty a[illegible]ere are inherent difficulties in fixing a definit[illegible]ne between capacity and incapacity. In the [illegible]esent case there is conclusiveness

beyond doubt. Thus, one of the reasons for applying the rule fails.

The United States in its brief refers to the use of X-ray or radium to produce sterility, and quotes medical authority[15] to the effect that the sterility produced may not be lasting. That merely demonstrates that an opinion as to the capability to bear children is unreliable. In the instant case we are not dealing with opinion but fact.

(b) *Some Courts Have Excluded Evidence of Physiological Condition on the Ground of the Indelicacy of the Required Proof; Such Reason Does Not Exist Here.*

It has sometimes been suggested that "the indelicacy of the facts to which such an inquiry might lead" may justify the exclusion of evidence of physiological change. *List* v. *Rodney, et al.*, 83 Pa. 483 (1877). Whatever may have been judicial opinion on the propriety of indelicate disclosures in 1877, the facts of medical science are no longer to be withheld from the legal knowledge of courts in contrast to their lay knowledge. In the present day further urging is hardly required for this assertion. This court is not to be fettered in arriving at the truth by such an outworn inhibition, permissible as it may have been in the day it was announced. Surely, the function of a court today is to be just before it is "delicate." "Ye shall know the truth, and the truth shall make you free."

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15. Petitioner's brief, p. 14.

(c) *Evidence of Incapacity Is Said to Have Been Barred on the Ground that the Consideration of Such Evidence Would Induce Surgical Operations to Prevent the Birth of Issue; This Reason Is Inapplicable Here.*

It has been stated that, if evidence of incapacity were admitted, "surgical operations might be resorted to, to make it absolutely certain that no issue could be born." *Hill* v. *Sangamon Loan and Trust Company*, 295 Ill. 619, 129 N. E. 554. Whatever may have been the basis for the fears of that court that it could not control the situation where improper surgical operations might be resorted to, such a reason is wholly invalid in the present case. The operation here was performed, not in violation of public morals, but to preserve the patient's health and possibly her life. No possible advantage could lie to the merely potential life beneficiary (the operation was performed on her seven years before the testator's death) to cut off her only remotely possible progeny. It is inconceivable that there could be any circumstance that would involve the patient, the surgeon, or these fourteen separate charities in a conspiracy to participate in an improper operation of such character.[16]

Another distinction between the situation where an illegal operation might be feared and the circumstances here is this: a will speaks only after the testator's death (Testamentary rights and property interests are not created until then), yet at the very

16. We have not discovered the remotest suggestion of an attempt to destroy possibility of issue in any of the cases on this question.

moment in the case at bar when the testator died the impossibility of issue in the life tenant created by the will had already been established. Hence, the motive for an operation to change property rights, so feared by courts where the breach of public policy could occur after the grant or devises upon a contingency, could not possibly exist.

Further, in any case involving estate or inheritance taxes it is difficult to see how such chicanery could be employed against the taxing power. Until the will is given effect by the death of the testator, no interest lies in any life tenant or remainderman. The instant the testator dies the tax attaches, and no subsequent act of the life tenant can in any fashion affect the extent of the gross estate subject to the tax. With this situation understood the fear of a surgical operation in fraud of the rights of the taxing power must be based upon the scheme of a possible life tenant of a possible pre-deceasing testator under the possible terms of a yet ineffective will, to defeat the possible taxing jurisdiction by submitting to a major surgical operation to eliminate her remotely possible progeny. To state the basis for this fear would seem to repel it.

(d) *It Is Occasionally Stated that Evidence of Incapacity Should Be Excluded to Maintain the Title to Property Free from Confusion; No Such Confusion Can Arise Here.*

The excluding rule has sometimes been supported by the argument that admission of evidence on incapacity would tend to uncertainty in the title to property. (*Farrington* v. *Commissioner*, 30 Fed. (2d)

915 (C. C. A. 1st); certiorari denied 279 U. S. 873.) Even the abstract validity of this reasoning is difficult to follow. It is hard to believe that the law, which presumes death after an unexplained absence of seven years (17 Corpus Juris 1167), and directs the administration of the absentee's estate (23 Corpus Juris 1007, 1008), is so incongruous as to fear a confusion of titles where the absence of capacity to give birth to a child is as scientifically capable of proof as here.[17] There is no reliance upon assumption in the present case: the incapacity here is as scientifically demonstrable as is death itself.

It should be clear, therefore, that none of the four reasons given for the rule are applicable to this case. The reason for the rule having no application the rule should have no application.

III

Without the Evidence as to Incapacity the True Value of the Estate for Tax Purposes Cannot Be Computed.

In addition to the reasons why the evidence of incapacity offered in this case is not barred by seeming precedents, because they do not apply here, public policy affirmatively requires the admissibility of this evidence.

This case arises wholly because of the alleged inability of the Commissioner of Internal Revenue to

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17. It is stated in 23 Col. L. Rev., at page 53. that "Under the wise discretion exercised by the English courts * * * not one instance has been found of the birth of a child after possibility of issue has been declared to be extinct." Consequently the recognition of the truth has not produced confusion in titles.

determine the value at the death of the testator of that residue of his estate which was to pass to the charities. If a simple life estate had been the only bar to immediate passage of the residue to the charities, the value of that residue could have been computed at once upon the mortality tables (*Ithaca Trust Company* v. *United States*, 279 U. S. 151; 73 L. ed. 647). The question therefore is to what extent did the provision for "issue" in the testator's will affect the value so determined.

To ascertain the effect of the provision for the issue of the life beneficiary it is necessary first to ascertain the possibility, or impossibility, of issue. Evidence on that score goes not to the question of where the title to the property lies, not to a decision between rival claimants, but wholly to the question of what the value of the ultimate residue to the charities is at the moment of the testator's death.

As stated by the Board of Tax Appeals in the case of *Farrington* v. *Commissioner*, 13 B. T. A. 274, 279, "it would be necessary [in a dispute on valuation] to consider whether the contingency is so remote as to have little or no effect upon the value of the remainder, as in *First National Bank of Birmingham, Exr. Patterson* v. *Snead*, 24 Fed. (2d) 186, or, on the other hand, whether the contingency is such as to make the remainder of only remote speculative value, as in *Humes* v. *United States*, 48 Sup. Ct. 347, 276 U. S. 487."

The wisdom, as a matter of public policy, of admitting evidence concerning the impossibility of issue, is not involved where the question to which the evidence goes is one of valuation by a party (the government) not directly concerned with anything more

than the size of the testator's estate under the statute. It was the province of the court to pass upon the weight of all evidence pertinent to value. Rather clearly the impossibility of issue affects directly the value of the expectancy of the charities, and is evidence affirmatively required for a proper administration of the taxing statutes.

CONCLUSION

It is the purpose of the statute to encourage charitable bequests (*Edwards* v. *Slocum*, 264 U. S. 61; 68 L. ed. 564), and to require no more certainty in the evidence of value than is generally found in "human affairs" (*Ithaca Trust Company* v. *United States*, 279 U. S. 151; 73 L. ed. 647). The evidence in the case at bar establishes beyond the realm of doubt that the birth of a child to the testator's daughter, the only event which could defeat the charitable bequests, was impossible.

The petitioner would deny the Court a knowledge of the facts through reliance upon an archaic rule. That rule, developed in generations of ignorance and resorted to as a refuge from uncertainty and mere opinion, is urged to defeat the presentation of a scientifically ascertained fact. No reason ever assigned for the rule has any application to the circumstances

in the case at bar. The rule is derogative of the truth: there is here no cause for its application. The Court below was right and should be affirmed.

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APPENDIX A.

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098-1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.* — Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54). Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a

private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.